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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 477.

BOSTON AND MAINE RAILROAD,
PETITIONER,
vs.
FRED ARMBURG,
RESPONDENT.

BRIEF FOR THE RESPONDENT.

Opinions Below.

The opinion of the Supreme Judicial Court of Massachusetts was filed September 12, 1931, and is reported in Massachusetts Advance Sheets, 1931, p. 1751. It is printed at p. 33 of the record.

The opinion of the Appellate Division of the Municipal Court of the City of Boston was filed June 27, 1930. It is printed at p. 28 of the record.

Statement of the Case.

Certiorari to the Municipal Court of the City of Boston was granted Nov. 2, 1931, to review a cause in that court wherein Fred Armburg is plaintiff in a common law action of tort, and the Boston and Maine Railroad defend-

ant, and wherein final judgment was entered on Sept. 25, 1931 for the respondent herein, the plaintiff below, in the sum of $28,893.41.

The petitioner and the respondent are hereinafter respectively referred to as the defendant and the plaintiff.

At the trial the defendant requested, and the court refused, the following rulings, (R. pp. 24, 25):

11. St. 1911, chap. 751, part 1, sec. 1, now General Laws, chap. 152, sec. 66, violates the commerce clause of the Federal Constitution, if it be construed as applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

14. Upon all the evidence the plaintiff is not entitled to recover in this action upon the following grounds and each of them:

(h) Because as a matter of law St. 1911, chap. 751, part 1, sec. 1, now General Laws, chap. 152, sec. 66, violates the commerce clause of the Federal Constitution, if it be construed as applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

The facts were as follows, (R. pp. 4-23):

(R. 6) The plaintiff, while traveling in the course of his employment by the defendant as a section hand upon a railroad motor car operated over the tracks of the Boston and Maine Railroad by another employee of the defendant, Section Foreman Connell, was seriously injured. The motor car ran into a switch which had been set against it and was overturned, Armburg being thrown to the ground. A red signal at the switch stand was so set as to indicate that the switch was set against the motor car, but Connell did not pay any attention to this signal or heed the warning shouts of members of another section crew nearby.

It was agreed at the trial that the plaintiff was not employed in interstate commerce at the time of his injury but was then engaged in intrastate commerce.

The defendant was a common carrier of freight and passengers for hire, both intrastate and interstate, and was not a subscriber under the provisions of the Massachusetts Workmen's Compensation Law.

(R. 6) The court found as a fact that the cause of the injuries to the plaintiff was the negligence of Connell, the operator of the railroad motor car upon which the plaintiff was riding at the time of the accident, and also found and ruled that Connell in operating the railroad motor car at the time of the accident was a fellow servant of the plaintiff.

Evidence introduced by the defendant at the trial, briefly summarized, was as follows:

(R. 7) The Massachusetts Commissioner of Insurance approves the policy forms and rates for compensation insurance; (R. 8) a bureau composed of insurance companies writing compensation insurance in Massachusetts, called the Massachusetts Rating and Inspection Bureau, submits proposed rates to the Department of Insurance; these are approved or disapproved, as the case may be; there is a book called the Basic Rate Manual, a Manual of Workmen's Compensation Insurance, approved by the Commissioner of Insurance, in effect at the time of the accident to the plaintiff, containing the following:

(R. 8) "Compensation Insurance policies shall not be written except upon the basis of the entire payroll of the assured which is the subject of Insurance. Under no circumstances shall a Compensation Insurance policy be written covering any part of a specific location of a given risk, leaving another part of the same location uninsured. If a

risk or a part of a risk is at a single specific location, such risk or such part of a risk shall be carried only by a single insurrance carrier.

(Fol. 9) "The following specific rules shall govern the treatment of payroll as the basis of premium for Compensation Insurance policies:

1. Division of Payroll

(a) "The term 'risk' as used in this Manual shall mean and include the entire operations of one employer within a given state."

(R. 9) The total main line trackage of the defendant is 2077.02 miles, of which 729.37 is in Massachusetts; a blueprint map of the Boston and Maine System was introduced; a copy of the monthly reports to the Interstate Commerce Commission for July, 1929, was introduced, showing (R. 14, 15) the total payroll and compensation, 2208 men on a daily basis paid $411,001; 15778 men on an hourly basis paid $1,921,971, and in train and engine service 3971 men paid $811,062, the three figures added together giving the total compensation for the month of July, 1929.

The annual report of freight commodity statistics of the Boston and Maine Railroad to the Interstate Commerce Commission for the year 1929 was introduced, showing (R. 18) that during that year the defendant handled 23,922,566 tons of freight, inclusive of both intrastate and interstate, for which it received $52,749,586. A witness estimated (R. 20, 21) that the total tonnage carried intrastate over the Boston and Maine Railroad to any other connecting carrier was a very small proportion, ten per cent or under; that approximately fifteen per cent of the total tonnage of freight carried originated in and terminated in the Boston and Maine Railroad, that in his opinion a very liberal approximation of the proportion of freight carried intrastate would be ten per cent or under.

The trial court found for the plaintiff. The case was reported to the Appellate Division of the Municipal Court of the City of Boston, and the Appellate Division dismissed the report, holding that the Massachusetts Workmen's Compensation Act applied to this defendant, (R. pp. 28-30) and that Sec. 66 of Chap. 152, General Laws, shut off the fellow servant defense.

The Appellate Division said, "This is a case purely of intrastate concern and regulation, and as to such matters we are clear that this defendant, remaining outside the compensation system by choice, does so on the conditions legislatively fixed." • • • "We feel sure that the ultimate decision must be that the legislature never intended a clear present to insurers by requiring insurance upon those whose duties and risks were such that there could be no collection, and the 'Pay-Roll Rules' appear to make such allowance." • • •

"Compensation Insurance policies shall not be written except upon the basis of the entire payroll of the assured *which is the subject of insurance.* (Italics ours.) It is a purely gratuitous assumption on the part of the defendant that it cannot by proper proceedings compel the Commissioner to exclude non-collectible risks from the insurance, or that it cannot in like manner force the adjustment of premium rates upon the basis of real risks." • • •

"All beyond this is the fact that the legislature has changed the common-law defense of negligence of a fellow servant. It hardly needs argument that not even an interstate carrier has a vested right in such a rule, in its application to intrastate matters."

From the final decision of the Appellate Division, the defendant appealed to the Supreme Judicial Court, which

affirmed the order of the Appellate Division dismissing the report, the reasons being set forth at length in the opinion (R. pp. 31-41).

The Supreme Judicial Court of Massachusetts, in passing upon requests made by the defendant at the trial (Requests Nos. 7, 8, 9, 10 and 12 d, e, f, and g; R. pp. 24, 25), to the effect that the Massachusetts Workmen's Compensation Act was not applicable to the defendant, construed the Act as follows, (R. p. 32):

"At the outset it is to be observed as the basis of this opinion that the Act is in no way applicable to the interstate commerce of the defendant or its employees while engaged in that commerce."

(R. p. 36) "An employer, conducting some business within the jurisdiction of the General Court and other business outside that jurisdiction, may insure under the act with respect to his employees in the part of his business within that jurisdiction and secure with respect to them all the benefits of the act unaffected by the circumstance that he continues to conduct the part of his business outside that jurisdiction without such insurance, and he may continue to conduct this latter part of his business under the principles of legal obligation governing it, free from any effect flowing from insurance under the act as to the other part of his business conducted within the jurisdiction of the General Court."

(R. p. 37). "The same employees may be engaged alternately during stated periods in intrastate and in interstate commerce. It may not be possible for the defendant to make a rigid classification of its employees between those engaged in intrastate and those engaged in interstate commerce, or to separate the two kinds of traffic. That is not required. There is nothing in the record to indicate that reasonably accurate estimates of the proportion of time of employees

spent in intrastate and interstate commerce cannot be made. The contrary cannot be assumed in the absence of proof."

(R. p. 40) "If the defendant insures in conformity to the provisions of the act, it need not insure its employees so far as engaged in interstate commerce. It can gain whatever advantages arise from accepting the Act by confining its insurance strictly to its employees to the extent they are engaged in intrastate commerce. The defendant, therefore, would be required to pay premiums based not on its entire payroll, but only on the part of its payroll rightly allocated to intrastate commerce. The rule of the Commissioner of Insurance requires that 'Compensation Insurance policies shall not be written except upon the basis of the entire payroll of the assured which is the subject of Insurance.' As applied to the defendant this rule means only its payroll of those of its employees engaged in intrastate commerce in Massachusetts, and those, if any, entitled to the benefit of St. 1927, Chap. 309, Secs. 2, 3. That is the only payroll of its employees subject to insurance. Seemingly it may be ascertained by determining the number of hours of employees spent in intrastate commerce."

(R. p. 40) "If the defendant is advised that the rules of the Commissioner of Insurance do it an injustice, that does not render the act unconstitutional. The law doubtless affords remedies, if on proper representation that official does not make rules just and legal in their operation on the defendant.

"It cannot be presumed, in the absence of any evidence or finding, that a fair and equitable method of ascertaining and computing the premiums due from the defendant in respect to insurance of its employees engaged in intrastate commerce cannot be worked out if it desires to become an

insured employer under the act. Certainly we cannot take judicial notice that there is any such practical impossibility. The evidence in the present record does not require a finding of that nature. The defendant requested no ruling on this point, and hence it is not open to it."

In its petition for certiorari the defendant states its reasons relied upon, in substance as follows:

(Petition, pp. 7, 8) The Workmen's Compensation Act, in so far as it requires a railroad engaged in both interstate and intrastate commerce to insure its employees to the extent that they are engaged in intrastate commerce or otherwise be subject to actions at common law without the benefit of common law defences (negligence of fellow servant) is in violation of the Commerce clause of the Constitution, in that it imposes a burden upon interstate commerce, contending that (1) classification, for the purposes of such insurance, of the employees of a railroad engaged in both interstate and intrastate commerce between those engaged in interstate commerce and those engaged in intrastate commerce, and the separation of the employees' services as between the two classes of commerce, so that such a railroad can insure its employees in so far as they are engaged in intrastate commerce, is impossible; and (2) even if it were not impossible for a railroad corporation engaged in both interstate and intrastate commerce to insure to the extent that its employees are engaged in intrastate commerce, the burden involved in the segregation of the services and risks referable to such intrastate commerce and the requirement that such a railroad shall so insure or be subjected to actions at common law for injuries received by its employees, without the benefit of the common law defenses in question, constitute a burden upon interstate commerce in violation of the Commerce clause of the Constitution.

In the specification of errors (Supporting Brief, p. 5) the following appears:

> 4. (1) The court below erred in ruling and holding that Mass. Gen. Laws, Chap. 152 and Sec. 66 thereof, * * * are not in violation of the commerce clause * * *
>
> (2) The court below erred in ruling and holding that Mass. Gen. Laws, Chap. 152 and Sec. 66 thereof, * * * are not in violation of the commerce clause * * *

Attention is respectfully directed to the material difference between the specification of errors and the requests for rulings at the trial, "St. 1911, Chap. 751, Part 1, Sec. 1, now Gen. Laws, Chap. 152, Sec. 66, violates the commerce clause."

The plaintiff claims that the only state law which the trial court was requested to declare unconstitutional was the statute, in a single section, abolishing the common law defenses of fellow servant, assumption of risk, and contributory negligence.

This extended statement of the case is deemed necessary to correct inaccuracies and omissions in the petition for certiorari and the supporting brief.

Summary of the Argument.

I.

Two questions only—the one whether the defendant, a carrier, is wholly outside of the State Workmen's Compensation Act, Mass. Gen. Laws, c. 152; the other whether the State law doing away with the fellow servant defense is repugnant to the Commerce clause of the Constitution of the United States—were raised in the trial court, the Municipal Court of the City of Boston, reported to the Appellate Division, and on appeal were reviewed by the Supreme Judicial Court, under the Statute limiting such review to the questions presented in the trial court. As the interpretation of the Statute by the State Court will be adopted here, the first question is disposed of. The second question, arising upon requests for rulings that the single section of the Statute affecting the fellow servant defense violates the Commerce clause, is the only Federal question presented on this record, and as that question has been settled, it is no longer open. Therefore, jurisdiction is questioned.

II.

Intrastate commerce only is involved here. The plaintiff when injured was not engaged in interstate commerce. The state laws are construed to apply only to intrastate commerce in its limited sense,—that is, only such commerce as is within State jurisdiction—, and the power of the States to establish by legislation departures from the fellow servant rule is definitely settled. If an employee of a carrier is injured while engaged in interstate commerce the Federal law applies; if injured while engaged in intrastate commerce, the law of the State applies.

III.

If this Court decides to review the Massachusetts Workmen's Compensation Act in its entirety, then the plaintiff says that the Act applies only to the part of the defendant's business which is wholly within the field of State control and regulation; that if the defendant chooses to accept the Act and provide compensation for its employees thereunder, it will not be required to pay premiums upon any part of its payroll within the operation of the Federal Employers' Liability Act, or any other Federal law. The administration of the compensation system by authorized State officers under rules of practice long established and well known utterly excludes all interstate commerce and is limited to the part of the defendant's business clearly within State jurisdiction; this appears from parts of the State Court opinion not found in the defendant's brief, but presented here. In its decisions since 1911 the State Court has held that the fellow servant defense is not open to this defendant; it has limited the operation of the Workmen's Compensation Act to the classes of employment and injuries within the jurisdiction of the General Court. The origin, nature, methods, means, and operative field of State Workmen's Compensation Acts are discussed, and it is shown that the Massachusetts act, in its application to the intrastate commerce of the defendant as defined by the State Court to be only that commerce wholly within the field of local control, is not repugnant to the Constitution of the United States. Interpretations of the Commerce clause by this Court have settled the principles of the law applying to carriers. The Federal Employers' Liability Act covers the entire field of interstate commerce. The States are left free to legislate concerning injuries occurring in intrastate employment. Harmony exists between Federal and State laws as interpreted by

Federal and State courts. If the Massachusetts Workmen's Compensation Act is held unconstitutional, all carriers in Massachusetts if unwilling to subscribe to the modern system will be permitted to escape liability to their employees for injuries sustained while engaged in intrastate commerce.

Jurisdiction.

No undecided Federal question is here presented. The case is wholly intrastate; the plaintiff was engaged in intrastate commerce when injured; the rights and liabilities of the injured and the wrong-doer come under State, not Federal, law; the State Courts have not said or intimated that the State law or any part of it applies to any injuries within the field of the Federal Employers' Liability Act or for which recovery may be had under any Federal law; on the contrary, every field within Federal jurisdiction is expressly excluded.

All except two of the contentions made by the defendant at the trial were so completely disposed of by the evidence and findings that the defendant did not present them for review in the Appellate Division. (See Opinion of Appellate Division, R. 28.) The first question presented for review was whether as a matter of statutory interpretation the provisions of the Massachusetts Workmen's Compensation Act apply at all to a railroad corporation operating in both interstate and intrastate commerce. The Court held, "The Act in our opinion leaves no room for doubt as to the first question." The defendant is clearly within the scope of the Act to the extent only of so much of its business as is wholly within the field of local control; *i. e.*, that business over which the State and not the Federal government has undoubted jurisdiction, and as the interpretation of a state statute is held to be wholly within the

province of the State Courts, no constitutional question is presented. The second question as stated by the Appellate Division is whether "the provission of Sec. 66 shutting off in an action at law the defense tthat the injury was caused by the negligence of a fellow employee does not fall in its application to such a corporation because putting an undue burden on interstate commerce." This was disposed of by the Appellate Division after interpreting the Act as applying only to injuries wholly within the field of local control and local regulation in the following words (R. 30): "All beyond this is the fact that the legislature has changed the common-law defense of negligence of a fellow-servant. It hardly needs argument that not even an interstate carrier has a vested right im such a rule, in its application to intrastate matters. *New York Central Railroad vs. White*, 243 U. S. 188; *Hawkins vs. Bleakly*, 243 U. S. 210."

As the omission by the defendant in its discussion of the Opinion of the Appellate Division at p. 11 of its brief of the narrow scope of the two questions presented to that Court and of the plain conclusions of that Court thereon tends to confuse the issue reviewable upon appeal from that Court, attention is called to the following facts: It was the defendant and not the Court which assumed "the necessary inclusion for insurance of all employees"; the Court said (R. 30): "It is a purely gratuitous assumption on the part of the defendant that it cannot by proper proceedings compel the Commissioner to exclude non-collectible risks from the insurance, or that it cannot in like manner force the adjustment of premium rates upon the basis of real risks." The Court further held (R. 29): "This is a case purely of intrastate concern and regulation, and as to such matters we are clear that this defendant, remaining outside the compensation system by choice, does so on the

conditions legislatively fixed. Its motives which led to that choice, based on an alleged difficulty in conforming (R. 30) its methods of doing business to the mechanism of the compensatory system, are immaterial."

From the order of the Appellate Division dismissing the report the defendant appealed to the Supreme Judicial Court. The statute governing the report and appeal in this case, G. L., Chap. 231, Sec. 108, 109, is printed in full in the defendant's brief at p. 12. It entitles an aggrieved party as of right to have any ruling by a Justice of the Municipal Court reported to the Appellate Division. If the Appellate Division shall decide that there has been no prejudicial error in the ruling complained of, it shall dismiss the report. The appeal to the Supreme Judicial Court "shall not remove the cause, but only the question or questions to be determined."

Mass. Gen. Laws, Chap. 231, Sec. 109.

The plaintiff therefore contends:

1. That the first question which the Appellate Division decided, viz. that the defendant in that part of its business which is wholly within the field of local control and regulation is subject to the provisions of the State Workmen's Compensation Act, involves only the interpretation by the State Courts of a State statute, and that it is elementary that the interpretation by the State Courts of such a statute will be adopted by this Court; therefore, the first question raised and decided by the Appellate Division has been finally determined and is not now open to review.

Chicago, Indianapolis & Louisville Railway Co. vs. Hackett, 228 U. S. 559.

2. That the second question relates to the authority of the Legislature to change the common-law defense of negligence of a fellow servant in an action brought by an em-

ployee against an employer to recover damages for personal injuries sustained by the employee while engaged in work which is wholly within the field of State control and regulation by reason of the negligence of the employer. The power of the Legislature to modify or abrogate the common-law defenses has been passed upon and sustained by this Court. "This Court repeatedly has upheld the authority of the States to establish by legislation departures from the fellow servant rule and other common law rules affecting the employer's liability for personal injuries to the employee."

New York Central Railroad vs. White, 243 U. S. 188, 198-200.

As the second question presents nothing more than the power of the Legislature to change the common-law rules, and that power has been definitely established, no substantial Federal question is presented upon this review.

The discussion in the opinion of the Supreme Judicial Court of the constitutional aspects of the Workmen's Compensation Act in general relates wholly to the interpretation of the Act as applying only to the field of local control and regulation. It is plain that that Court had in mind the statutory limitation of the review upon the appeal from the Appellate Division to "the question or questions to be determined." This is shown by the conclusion of the opinion (R. 41): "The essential points of the case at bar, so far as they relate (fol. 45) to interstate commerce, seem to us to be concluded against the contention of the defendant by the decisions in *New York Central Railroad vs. White*, 243 U. S. 188, and *Hawkins vs. Bleakly, id.* 210."

To sustain its contention that this Court has jurisdiction, the defendant must show that it specially set up a Federal right in the court below which was denied by the

highest court of the State. In *Chicago, Indianapolis & Louisville Railway Co. vs. Hackett*, 228 U. S. 559, this Court said:

"Our duty, of course, is confined to determining whether error was committed by the court below as to the Federal questions involved, and as it is impossible to predicate error as to matters not pleaded or proved in the court below, which were essential to be pleaded and proved, it follows that the contention concerning the denial of the full faith and credit clause furnishes no ground for reviewal." * * * "We conclude, therefore, that we are not concerned in the interpretation placed upon the Indiana act unless it be that that construction offends against some Federal right properly asserted and open to our consideration."

Chicago, Indianapolis & Louisville Railway Co. vs. Hackett, 228 U. S. 559.

Wabash Railroad Company vs. Hayes, 234 U. S. 86.

Argument.

(1) The power of the State to change the fellow servant defense is the only question open to review upon this record.

Seemingly the only question now open for review is the matter raised by the requests made at the trial that Sec. 1 of St. 1911, Chap. 751, Part 1 (now Sec. 66 of G. L., Chap. 152) violates the commerce clause, and is therefore void.

The statute referred to in the requests is:

Section 66. In an action to recover damages for personal injuries sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense:

1. That the employee was negligent;

2. That the injury was caused by the negligence of a fellow employee;

3. That the employee had assumed the risk of the injury.

(2) This defense is generally abolished.

The fellow servant rule, in its application to injuries in interstate commerce, was abrogated by Congress in 1908, when the Federal Employers' Liability Act was passed. It has since been abrogated as to intrastate commerce by constitution in Arizona and by statute in nearly all of the other states, and Workmen's Compensation Laws have been generally adopted. This is so well known that citations seem unnecessary.

(3) Modification of fellow servant defense within the power of the State.

This court repeatedly has upheld the authority of the states to establish, by legislation, departures from the fellow servant rule and other common law rules affecting the employer's liability for personal injuries to the employee.

N. Y. Cent. R. R. vs. White, 243 U. S. 188; and cases cited.

(4) The plaintiff, when injured, was engaged in intrastate commerce.

This case is wholly intrastate. The plaintiff was not engaged in interstate commerce when injured; he was then engaged in intrastate commerce. If the injury occurs while the employee is engaged in interstate commerce, the Federal law applies; if the injury occurs while the employee is engaged in intrastate commerce, the state law applies.

Nogueira vs. N. Y., N. H. & H. R. R. Co., 281 U. S. 128.

St. Louis, Iron Mountain & Southern Railway vs. Hesterly, 228 U. S. 702.

Taylor vs. Taylor, 232 U. S. 363.

Seaboard Air Line Railway vs. Horton, 233 U. S. 492, 501.

Wabash Railroad vs. Hayes, 234 U. S. 86.

Illinois Central R. R. vs. Behrens, 233 U. S. 474.

Michigan Central R. R. vs. Vreeland, 227 U. S. 59, 66.

Toledo, St. Louis & Western R. R. vs. Slavin, 236 U. S. 454.

Raymond vs. Chicago, Milwaukee & St. Paul Railway, 243 U. S. 43.

(5) The Workmen's Compensation Act is interpreted by the State Courts; it applies only to business within State control and regulation. It does not apply to interstate commerce.

If the constitutionality, under the Commerce clause, of the entire statute, whereby the state of Massachusetts in the year 1911 adopted the system which is now in force, designed to provide compensation for workmen injured either with or without fault on the part of the employer in industrial accidents, now found in Chap. 152 of the General Laws of Massachusetts, and commonly called the Workmen's Compensation Act, is open to review, then it is respectfully submitted that under the interpretation of the state court, holding the act to apply only to employment wholly within the jurisdiction of the state, the law imposes no burden on interstate commerce. It is not shown that the proper officers of the state cannot determine under the state law a fair and reasonable amount to be paid by the employer based exclusively upon the wages paid employees

in intrastate commerce, wholly removed from all wages for work in matters outside of state control. On the contrary, it does appear that the employer may, if desirous of adopting the compensation system, become a subscriber by providing compensation for injuries arising out of, and in the course of, employment wholly controlled by state law, paying therefor the rates established by the proper officers of the state, and subject to review by the courts, based, as required to be administered by the state and its officers charged with duties under the compensation law, solely upon the intrastate work, its degree of hazard, and the wages paid therefor. The hazards of, or wages paid for, labor in interstate commerce, or any other work which is not wholly within the jurisdiction of the state, are not to be taken into account in determining the payment which the employer will be required to make if desirous of adopting the compensation system.

(6) Compensation acts held Constitutional.

The constitutionality of the New York workmen's compensation act, which is compulsory in its operation, and of the Iowa act, which like the Massachusetts act is optional, providing compensation for injury in industrial accidents within the field of local control, is established.

New York Central Railroad vs. White, 243 U. S. 188.

Hawkins vs. Bleakly, 243 U. S. 210.

(7) The interpretation by the State Court of a State statute is adopted by this Court.

It is elementary that the interpretation of a State statute by the State Court will be accepted by this Court, and the constitutionality of the statute tested under that view.

Gatewood vs. North Carolina, 203 U. S. 541.

Chicago, Indianapolis & Louisville Railway Co. vs. Hackett, 228 U. S. 559.

(8) The Act, as interpreted by the State Court as shown by parts of the opinion (omitted from the defendant's brief), applies only to "intrastate commerce" which is wholly within State control and regulation. "Intrastate commerce" does not include any work in any field of federal regulation.

There is no ground for the contention of the defendant that the intrastate commerce to which the Act applies includes any commerce within the scope of the Federal Employers' Liability Act, or any other Federal act.

The defendant evidently has overlooked, in its quotations from the opinion of the State Court, the limitation of the operation of the Massachusetts Workmen's Compensation Act to that part of the defendant's business which is wholly within the jurisdiction of the State, and the utter exclusion for any purpose whatever under the Act of all insurance requirements, provision for compensation, or other application of the Act to any employment, injury, or risk of injury, in interstate transportation or work so closely related to it as to be practically a part of it, or any other work for which in case of injury recovery may be had under any Federal law. This limitation of the operation of the Massachusetts Workmen's Compensation Act to matters within the jurisdiction of the State plainly appears in those parts of the opinions of the State Courts which are inadvertently omitted from the defendant's brief. The parts quoted by the defendant should be read with the context, to show the true sense in which the words "intrastate commerce" were used by the State Court. The parts of the opinion which follow show in italics every quotation found in the defendant's brief with page references, as B. 21, etc.; the context, not in italics, shows the qualified sense in which

the term "intrastate commerce" is used, and that the Act as interpreted does not apply to any business within any field appropriated by Congress.

Reviewing two questions—the one as to the inclusion of the defendant within the application of Chap. 152, Gen. Laws, the Workmen's Compensation Act; the other as to the constitutionality of Sec. 66 thereof abolishing the common-law defenses—on an appeal which brought up only the question or questions to be determined, the Supreme Judicial Court said:

(R. p. 32) "The defendant contends that the Workmen's Compensation Act (hereafter called the act) is not applicable to a railroad engaged in both intrastate and interstate commerce, and that hence the defense that the injury to the plaintiff was caused by a fellow servant is open to it notwithstanding the provision of G. L. c. 152, Secs. 66, 67, to the effect that such defense, with exceptions not here material, is denied to an uninsured employer. * * * * *"

"At the outset it is to be observed as the basis of this opinion that the act is in no way applicable to the interstate commerce of the defendant or its employees while engaged in that commerce. It was said in Seaboard Air Line vs. Horton, 233 U. S. 492, at 501: *'It is settled that since Congress, by the act of 1908, took possession of the field of the employer's liability to employees in interstate transportation* (R. 33) *by rail, all state laws upon the subject are superseded. Second Employer's Liability Cases,* 223 U. S. 1, 55.' *That statement applies also to all State laws thereafter enacted; they are void in their application to the subject of interstate commerce, no matter how phrased."* (R. 21, 22, 38.)

The relevant provisions of the Workmen's Compensation Act are these sections of G. L. c. 152:

"1. The following words as used in this chapter shall, unless a different meaning is plainly required by the context or specifically prescribed, have the following meanings: * * *

"(4). Employee, every person in the service of another under any contract of hire, express or implied, oral or written, except masters of and seamen on vessels engaged in interstate or foreign commerce, and except one whose employment is not in the usual course of the trade, business, profession or occupation of his employer. * * *"

(R. 34) "The words of Sec. 1 (4) just quoted are of broad import. It is difficult to confine by construction a definition of employee which states explicitly that it includes 'every person in the service of another under any contract of hire,' with two specified exceptions. The main purpose of the act reenforces the comprehensiveness of this definition. That purpose was to substitute a method of accident insurance, in place of the rights and liabilities established by the common law as modified by the employers' liability act and other statutes, for substantially all employees save the excepted classes, **to the extent that the attainment of that result was within the jurisdiction of the General Court.** It was a humanitarian measure enacted in response to the conviction that previous remedies had failed to give the measure of relief to employees for personal injuries arising out of their employment demanded by modern conditions. Although the act was optional and not compulsory, its general tenor disclosed a legislative aim to

secure its wide adoption and use. The interpretation of the act has been and ought to be, so far as reasonably practicable, to promote the accomplishment of its beneficent design. Express exclusion of two classes of employees from the operation of the act and the enactment of two amendments to the excluding clause are strong indications that all others within the natural purport of its language were to be included. If it had been the intent of the Legislature to exclude railroads engaged in interstate commerce from the operation of the act, it would have been a simple matter to state that intent in unequivocal language. **The words, purpose, and legislative history of the act as now phrased require the conclusion that it was intended to be applicable to all classes of injuries therein described within the competency of the legislative department.** 'The statute is as broad as the jurisdiction of the Commonwealth.' * * *"

(R. 35) "*The jurisprudence of the State is supreme and exclusive over personal injuries received by railroad employees while engaged in intrastate commerce.* (B. 22, 39.) * * * It was said in *Wabash Railroad vs. Hayes,* 234 U. S. 86, 89-90:

'Had the injury occurred in interstate commerce * * * the Federal act undoubtedly would have been had under the common or statute law of the State; in other words, the Federal act would have been exclusive in its operation, not merely cumulative. (Cases cited.) On the other hand, if the injury occurred outside of interstate commerce, the Federal act was without application and the law of the State was controlling. *Illinois Central Railroad vs. Behrens,* 233 U. S. 473.' * * *"

(R. p. 35) "*There are numerous cases where decisions of State courts have been reversed because recovery had been*

allowed under workmen's compensation laws when, as the United States Supreme Court held, the injury had occurred while the employee was engaged in interstate commerce and where, therefore, the State laws were inapplicable and the Federal employers' liability act governed the rights and liabilities of the parties. (R. 22) * * * It does not appear to have been suggested in any of these decisions that railroad corporations were not subject to State workmen's compensation acts as to their intrastate business." * * *

(R. p. 36) "Both the words and the purpose of the act seem to require the conclusion that, with respect to the injury to the plaintiff occurring while he was engaged in intrastate commerce, the defendant is deprived of the defense that the injury was caused by a fellow servant of the plaintiff. * * * **The act does not require, and the decision in the Cox case does not mean, that an employer must insure branches or departments or kinds of business which for any reason are not within the jurisdiction of the General Court and thus necessarily outside the scope of the act. An employer, conducting some business within the jurisdiction of the General Court and other business outside that jurisdiction, may insure under the act with respect to his employees in the part of his business within that jurisdiction and secure with respect to them all the benefits of the act unaffected by the circumstance that he continues to conduct the part of his business outside that jurisdiction without such insurance; and he may continue to conduct this latter part of his business under the principles of legal obligation governing it, free from any effect flowing from insurance under the act as to the other part of his business conducted within the jurisdiction of the General Court.** It is an implied condition of all statutes that they were intended to operate only within the jurisdiction of the legislative body enacting them. * * *"

(R. p. 37) "It is often a question of difficulty whether a particular injury arose out of intrastate or interstate commerce. That difficulty exists quite apart from the act and is not enhanced by its provisions. It is inherent in the complexities of the business of conducting a railroad in different States and transacting both intrastate and interstate business. There are differences in certain instances as to the persons entitled to recovery and the persons to whom the amount recovered may ultimately be payable under the Federal employers' liability act and under the workmen's compensation act. These and other differences appear to us to constitute merely difficulties of a kind not infrequently encountered in the practical administration of affairs, but not to amount to insurmountable obstacles in the way of construing the scope of the statute according to its words and purpose." (B. 43, 44.)

(R. p. 37) "The same employees may be engaged alternately during stated periods in intrastate and interstate commerce. It may not be possible for the defendant to make a rigid classification of its employees between those engaged in intrastate and those engaged in interstate commerce, or to separate the two kinds of traffic. That is not required. There is nothing in the record to indicate that reasonably accurate estimates of the proportion of time of employees spent in intrastate and interstate commerce cannot be made. The contrary cannot be assumed in the absence of proof. It may be troublesome for the defendant to establish a basis for the insurance of the portions of its employees engaged in intrastate commerce. (B. 41, 45.) That, however, is a legislative and not a judicial question. We can only interpret the statute as it was framed. * * *"

(R. p. 38) "The intention of the General Court in enacting any statute must be ascertained, not alone from the

literal meaning of its words, but from a view of the whole system of which it is but a part, and in the light of the common law and previous statutes on the same subject. * * * Giving full weight to that principle, *we think that the act is applicable to the defendant as to its employees while engaged in intrastate commerce.* (B. 13, 39.)

"The defendant contends that thus interpreted the act is unconstitutional as applied to the defendant, in that it imposes an undue burden upon interstate commerce contrary to Art. 1, Sec. 8, of the Constitution of the United States. (B. 40) **No statute of the Commonwealth can impose a burden upon interstate (R. p. 39) commerce. That is fundamental under our dual system of government.** * * *

In *Sherlock vs. Alling*, 93 U. S. 99, at 103, it was said:

'In conferring upon Congress the regulation of commerce it was never intended to cut off the States from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.' *Pennsylvania Railroad vs. Hughes*, 191 U. S. 477, 488. *Missouri Pacific Railway vs. Castle*, 224 U. S. 541, 544-545. *Chicago, Milwaukee & St. Paul Railway vs. Solan*, 169 U. S. 133, 137-138. The workmen's compensation act is an exercise of the police power of the Commonwealth. *Mountain Timber Co. vs. Washington*, 243 U. S. 219, 238-239. *Madera Sugar Pine Co. vs. Industrial Accident Commission*, 262 U. S. 488, 501-502.

"The provisions of G. L. c. 152, as herein interpreted, do not in our opinion burden the interstate commerce of the

defendant. (B. 40.) *Whether the defendant shall avail itself of that act is wholly optional with it. If it does not insure in accordance with its provisions, it cannot, in common with all other employers in like situation, interpose the defenses of assumption of risk, contributory negligence, or the fellow servant doctrine in actions for personal injury brought against it by its employees engaged in intrastate commerce.* (B. 14, 61.) It was said touching this subject in *Opinion of the Justices,* 209 Mass. 607, at page 610:

"The rules of law relating to contributory negligence and assumption of the risk and the effect of negligence by a fellow servant were established by the courts, not by the Constitution, and the Legislature may change them or do away with them altogether as defenses (as it has to some extent in the employers' liability act) as in its wisdom in the exercise of powers entrusted to it by the Constitution it deems will be (R. p. 40) best for the "good and welfare of this Commonwealth. Const. Mass. c. 1, Sec. 1, art. 4. See *Missouri Pacific Railway vs. Mackey,* 127 U. S. 205; *Minnesota Iron Co. vs. Kline,* 199 U. S. 593.' "

"To the same effect are *New York Central Railroad vs. White,* 243 U. S. 199, 200, and cases cited, and *Silver vs. Silver,* 280 U. S. 117, 122. *If the defendant insures in conformity to the provisions of the act, it need not insure its employees so far as engaged in interstate commerce. It can gain whatever advantages arise from accepting the act by confining its insurance strictly to its employees to the extent they are engaged in intrastate commerce. The defendant, therefore, would be required to pay premiums based not on its entire payroll, but only on the part of its payroll rightly allocated to intrastate commerce. The rule of the commissioner of insurance requires that 'Compen-*

sation Insurance policies shall not be written except upon the basis of the entire payroll of the assured which is the subject of insurance.' As applied to the defendant this rule means only its payroll of those of its employees engaged in intrastate commerce in Massachusetts and those, if any, entitled to the benefits of St. 1927, c. 309, Sec. 2, 3. That is the only payroll of its employees subject to insurance. Seemingly it may be ascertained by determining the number of hours of employees spent in intrastate commerce. If such insurance would have any effect on interstate commerce, it would be purely incidental and therefore would infringe upon no constitutional inhibitions. (B. 14, 40, 41.) * * *

"If the defendant is advised that the rules of the commissioner of insurance as at present framed do it an injustice, that does not render the act unconstitutional. The law doubtless affords remedies if on proper representation that official does not make rules just and legal in their operation on the defendant.

"It cannot be presumed, in the absence of any evidence or finding, that a fair and equitable method of ascertaining and computing the premiums due from the defendant in respect (R. p. 41) to insurance of its employees engaged in intrastate commerce cannot be worked out if it desires to become an insured employer under the act. Certainly we cannot take judicial notice that there is any such practical impossibility. The evidence in the present record does not require a finding of that nature. The defendant requested no ruling on this point and hence, it is not open to it.

"The essential points of the case at bar, so far as they relate to interstate commerce, seem to us to be concluded

against the contention of the defendant by the decisions in New York Central Railroad vs. White, 243 U. S. 188, *and Hawkins vs. Bleakly, id.* 210." (B. 61.)

(9) The fellow servant defense has not been open to the defendant in Massachusetts since the year 1911.

In *Henshaw vs. Boston & Maine Railroad,* 222 Mass. 459, 561, the court held, "The defendant was not a subscriber under St. 1911, Ch. 751, so the only questions before the jury are in regard to the defendant's negligence and the amount of damages the plaintiff was entitled to recover."

Henshaw vs. Boston & Maine Railroad, 222 Mass. 459.

In *Lyford vs. Boston & Maine Railroad,* 227 Mass. 10, the court held, "As the defendant does not appear to have been a subscriber under the Workmen's Compensation Act, the decisive question is whether there was any evidence tending to show negligence on the part of the defendant or its servants."

Lyford vs. Boston & Maine Railroad, 227 Mass. 10.

In *Dooley vs. Sullivan,* 218 Mass. 597, it was held, "The defendants are not subscribers under the terms of the statute. It follows that neither contributory negligence, the negligence of a fellow employee, nor the plaintiff's assumption of the risk of injury, is open to the defendants as a defense to the action. St. 1911, Ch. 751, Part 1, Sec. 1.

Dooley vs. Sullivan, 218 Mass. 597.

In *Pitcher vs. Worcester Consolidated Street Railway,* 240 Mass. 185, it was held, "It was admitted that the de-

fendant was not insured under the Workmen's Compensation Act and that the negligence of the plaintiff, his assumption of the risk, and the negligence of a fellow employee, were not grounds of defense."

Pitcher vs. Worcester Consolidated Street Railway, 240 Mass. 185.

(10) The defendant is not liable under State law for injuries sustained in interstate commerce.

The Act has been limited in previous cases to the field of local control. In *Lynch vs. Boston & Maine Railroad*, 227 Mass. 123, 126, it was held, "If the employee of a railroad engaged in both interstate and intrastate commerce is injured or killed while in the former service the carrier's liability is controlled and must be determined solely by the Federal law; if in the latter service, such liability rests wholly upon the State law.

Lynch vs. Boston & Maine Railroad, 227 Mass. 123.

In *Duart vs. Simmons*, 231 Mass. 313, 320, it was held, "Although our Act is constitutional in its general aspects both under the State and Federal constitution, *Young vs. Duncan*, 218 Mass. 346, *Hawkins vs. Bleakly*, 243 U. S. 210, we feel constrained by the controlling authority of the *Jensen* case *(Southern Pacific Co. vs. Jensen*, 244 U. S. 205) to hold that it does not apply to injuries having a maritime origin."

Duart vs. Simmons, 231 Mass. 313, 320.

In *Corbett vs. Boston & Maine Railroad*, 219 Mass. 351, 356, it was held, "The Federal act in the field covered by it

supersedes all State statutes. As to matters within the scope of the Federal power, legislation by Congress is supreme. So long as Congress had not acted as to liability for injuries received by employees of railroads while engaged in interstate commerce, legislation by the State touching that subject, being within the police power, was valid. But when Congress exerted its jurisdiction to regulate in this respect commerce between the States, State statutes previously operative in that sphere yielded to its paramount and exclusive power. * * * If the employee of a railroad engaged in both interstate and intrastate commerce is injured or killed while in the former service, the carrier's liability is controlled and must be determined solely by the Federal law; if in the latter service, such liability rests wholly upon the State law."

Corbett vs. Boston & Maine Railroad, 219 Mass. 351, 356.

In *Toland's case*, 258 Mass. 470, 472, the court stated, **"The Workmen's Compensation Act therefore must be and is interpreted as intended only to operate upon the classes of employment and injury within the jurisdiction of the General Court.** On the other hand, the words of the Act and its chief aim render the conclusion irresistible that the General Court intended to make the Act applicable to all classes of injuries therein described which are within its jurisdiction.

Toland's case, 258 Mass. 470, 472.

The Massachusetts Workmen's Compensation has not been shown to violate the Commerce clause of the Constitution.

"The action of the State must be treated as correct unless the contrary appear."

Hendrick vs. Maryland, 235 U. S. 610, 624.

(11) The origin, nature, methods, means, and operative field of State Workmen's Compensation Acts.

By the common law as administered in the several states, the employee, like every other member of the community, was expected to bear the risks necessarily attendant upon life and work, subject only to the right to be indemnified for any loss inflicted by wrong-doers. The employer, like every other member of the community, was in theory liable to all others for loss resulting from his wrongs, the scope of his liability for wrongs being amplified by the doctrine of *respondeat superior*. This legal liability, which in theory applied between employer and employee as well as between others, came in the course of time to be seriously impaired in practice. The protection it provided employees seemed to wane as the need for it grew. Three defenses, the doctrines of fellow servant's negligence, of assumption of risk, and of contributory negligence, rose and flourished. When applied to huge organizations and hazardous occupations they practically abolished the liability of employers to employees; and in so doing they worked great hardship and apparent injustice. The wrongs suffered were flagrant; the demand for redress, insistent; and the efforts to secure remedial legislation widespread. The evils of the fellow-servant rule as applied to railroads were recognized as early as 1856, when Georgia passed the first law abolishing the defense. Between the passage of that act and the passage of the First Federal Employers' Liability Act, fifty years elapsed. In those fifty years only four more states had wholly abolished the defense of fellow servant's negligence. Meanwhile, the number of accidents to railroad employees had become appalling. In the year 1905-1906 the number killed while on duty was 3,807 and the number injured 55,524. The promoters of reme-

dial action, unable to overcome the efficient opposition presented in the legislatures of the several states, sought and secured the powerful support of the President. Congress was appealed to and used its power over interstate commerce to afford relief. Not one of the thirty-seven states or territories which now have workmen's compensation laws had introduced the system. Yet the conception and value of compensation laws was not unknown to Congress It then had under consideration the first compensation law for Federal employees, which was enacted May 30, 1908 (35 Stat. 556). The need of its speedy passage had been called to the attention of Congress by the President in the same special message which urged the passage of the Federal Employers' Liability Act of April 22, 1908.

In the effort to remove abuses, a study had been made of facts, and of the world's experience in dealing with industrial accidents; that study uncovered as fiction many an assumption upon which American judges and lawyers had rested comfortably. The conviction became widespread that our individualistic conception of rights and liability no longer furnished an adequate basis for dealing with accidents in industry. It was seen that no system of indemnity dependent upon fault on the employers' part could meet the situation, even if the law were perfected and its administration made exemplary. For in probably a majority of cases of injury there was no assignable fault, and in many more it must be impossible of proof.

It was urged: Attention should be directed, not to the employers' fault, but to the employees' misfortune. Compensation should be general, not sporadic; certain, not conjectural; speedy, not delayed; definite as to amount and time of payment; and so distributed over long periods as

to insure actual protection against loss or lessened earning capacity. To a system making such provision, and not to wasteful litigation, dependent for success upon the coincidence of fault and the ability to prove it, society, as well as the individual employee and his dependents, must look for adequate protection. Society needs such a protection as much as the individual, because ultimately society must bear the burden, financial and otherwise, of the heavy losses which accidents entail. And since accidents are a natural, and in part an inevitable, concomitant of industry as now practiced, society, which is served thereby, should in some way provide the protection. To attain this end, cooperative methods must be pursued; some form of insurance—that is, some form of taxation. Such was the contention which has generally prevailed. Thus out of the attempt to enforce individual justice grew the attempt to do social justice.

It is the State which is both primarily and ultimately concerned with the care of the injured and of those dependent upon him, even though the accident may occur while the employee is engaged directly in interstate commerce. Upon the State falls the financial burden of dependency, if provision be not otherwise made. Upon the State falls directly the far heavier burden of the demoralization of its citizenry, and of the social unrest which attend destitution and the denial of opportunity. Upon the State also rests, under our dual system of government, the duty owed to the individual to avert misery and promote happiness so far as possible.

The principle underlying workmen's compensation laws is the same in all the states. The methods and means by which that principle is carried out vary materially. The

principle is that of insurance, the premiums to which are contributed by employers generally. How the insurance fund shall be raised and administered; what the scale of compensation or relief shall be; how the contributing groups of employers shall be formed; whether or not a state fund shall be created; whether the individual employer shall be permitted to become a self-insurer; whether he shall be permitted to deal directly with the employee in making settlement of the compensation to be awarded; on all these questions the laws of the several states do, and properly may, differ radically. What methods and means the State shall adopt in order to provide compensation for injuries to citizens or residents where Congress has left it free to legislate, rests (subject to constitutional limitations) wholly within the judgment of the State.

It is misleading to speak of the new obligation of the employer to contribute to compensation for injuries to workmen as an increase of the "employer's liability." It is not a liability for a violation of a duty. It is a direct—a primary—obligation in the nature of a tax. It is but the application of the modern system, evolved from the realization that the duty of the state to the individual to avert misery and promote happiness so far as possible requires laws not only to protect the individual under the ancient theory of making the wrong-doer indemnify him whom he has wronged, but, recognizing the inability of the injured wage earner to support himself or his family, to protect society from the financial burden of dependency which must be borne by it, and from the demoralizing results of poverty, with its concomitants of vice and crime. Commissions appointed in many of the states made a careful study of industrial accidents in America, England, and Germany,

The conclusions of all of these commissions were substantially the same. Recommendations were made and laws enacted in most of the states alike in principle but properly varying in methods and means by which that principle is carried out, all founded upon the sound doctrine that industrial accidents are an incident of industry and that the care and protection of the injured should be provided for on the basis of compensation instead of the basis of a remedy for the wrong.

New York Central Railroad Company vs. Winfield, 244 U. S. 147.

The field within which State laws may operate is limited to that business which is wholly within the jurisdiction of the Legislature of the State. The field which Congress, under the Commerce clause of the Constitution, has appropriated is excluded from the operation of every State law. The Federal Employers' Liability Act covers the entire field of injuries to employees of an interstate carrier by rail which occur in interstate transportation, or in work so closely related to it as to be practically a part of it, inclusive of injuries which occur without any negligence of the carrier. The Federal act excludes the operation of state workmen's compensation acts in the entire field which it occupies. The term "intrastate commerce" as used in connection with the field of operation of State compensation laws means only so much of the business of the carrier as is wholly outside of any field which Congress has appropriated; it covers only that business which it is within the province of the Legislature of the State to regulate. This rule was clearly recognized and plainly stated by the Supreme Judicial Court of Massachusetts in the instant case. It is the same construction which the same

Court has adopted and followed ever since the Act became operative, twenty years ago. The expression "intrastate commerce" frequently appearing in the opinion in the instant case follows the interpretation of the Act as applying only to branches or departments or kinds of business within the jurisdiction of the General Court of Massachusetts and as not requiring insurance of branches or departments or kinds of business which for any reason are not within the jurisdiction of the General Court, and therefore necessarily outside the scope of the Act, is limited by the preceding words of utter exclusion, to that intrastate commerce which is wholly within the field of local control. The consideration in their entirety of the opinions of the Appellate Division and of the Supreme Judicial Court in the instant case plainly shows that the words "intrastate commerce" are used in the more limited sense and are qualified by the limitations of the scope of the Act to the field of local control.

(12) Compensation costs not chargeable against interstate commerce.

The defendant says that insurance premiums to provide workmen's compensation would be payable out of its general funds, and therefore burden interstate commerce. The earnings of the defendant through its intrastate commerce presumably go into its general treasury. The payroll in the field of local control and regulation, as well as sums paid for damages for personal injuries in that field, ought to be allocated to the intrastate part of the carrier's business. So far as the plaintiff has been able to ascertain no court has ever held any payment for workmen's compensation to burden or affect interstate commerce. There are certain operating expenses of the business of a carrier

which have never been held a burden upon interstate commerce. The cost of management of the business by executive officers, usually consisting of a President, Treasurer, Chairman of the Board, Executive Committee, and Directors, is not considered a burden. These officers are men of recognized ability in their chosen field. They determine the value of their own services, and establish their salaries accordingly. They purchase locomotives, cars, rails, materials, and supplies. They incur and pay all bills incident to the business of the carrier; yet no carrier has ever urged that these expenditures, however vast in amount, burden interstate commerce.

(13) The administration of the compensation system is governed by established practice; risks are classified according to hazard; the cost is limited to the subject of insurance.

The general methods of application of the main provisions of all workmen's compensation acts of the class or kind in force in Massachusetts, where the acceptance of the act is optional alike to employer and employee, are the same in all of the states which have adopted the optional plan. Twenty or more years ago, when compensation laws first came into force, practices were adopted which have since become so universal and so generally understood that they may be said to be matters of common knowledge.

Under established practices the main questions,—which are, the occurrence of the injury; whether it arose out of and in the course of the employment; and the extent to which the employee is disabled;—are quickly and finally determined by qualified state officers. The various details involved in the acceptance of an Act, commonly called be-

coming a subscriber, are in like manner attended to, considered, decided, and properly adjusted by qualified state officers upon evidence submitted, often informally, by the interested parties, the employer, the insurer, and the employee. Rights of appeal or review are preserved so that proper judicial review is safeguarded.

The following general facts are so well known that citation of authority or detailed discussion seems unnecessary:

(a.) The cost of providing for the payment of the compensation (a fixed percentage of average weekly earnings, with some additions for specific injuries) is based upon the amount of wages paid and the degree of hazard which experience has shown to be involved in each particular line of work.

(b.) The employees are grouped or classified so that the amount required to pay for the compensation guaranteed may not be too great, as to those whose work is comparatively free from danger of occupational injury, nor too small to protect those whose work is attended with serious danger of injury. Here, again, practical experience is the guide.

(c.) The payments to provide compensation are estimated in the first instance from figures submitted by the employer showing the probable number of men to be employed in the several groups and the wages they will probably earn; the required percentages of the estimated payrolls, according to the rates established by the proper officers of the state as fair and adequate to provide compensation for the men who may suffer injury in each group, is then paid by the employer. Such payments, necessarily based upon the employer's own estimates, are subject to adjustment from time to time, usually at the end of each

year, when books are audited and the exact amount of wages received by employees in the several groups is ascertained, and accounts are then balanced between employers and insurers and settled on a practical business basis. Any disagreement between employer and insurer is subject to judicial determination and review.

Plainly the authorized officers of the state can, must and will, if the defendant chooses to become a subscriber, ascertain and measure the degree of hazard attending every occupation which the state may lawfully regulate, group the employees according to the hazard, and determine the payment required to provide compensation, according to the danger of injury to which the employees in each group are exposed. They will also perform their duties in all matters of accounting, requiring the inclusion therein of all business required by law to be included, and the exclusion therefrom of all business required by law to be excluded. Thus, as the Appellate Division well said, (R. 30) "It is a purely gratuitous assumption on the part of the defendant that it cannot by proper proceedings compel the Commissioner to exclude non-collectible risks from the insurance, and that it cannot in like manner force the adjustment of premium rates upon the basis of real risks."

(14) The defendant can accept the Act if it chooses.

The full and proper administration by the State of Massachusetts of its system of workmen's compensation is within the power reserved to the States under the Constitution. It extends, of course, no farther than the field of local control and regulation; but within that field the power of the state to administer the law is established beyond controversy. If the defendant desires to provide the measure of

compensation fixed by law for its employees who suffer injury arising out of and in the course of their employment, the State will ascertain the cost, fairly and equitably, based upon the percentages of the payroll of the employees in the extra-hazardous, hazardous and non-hazardous branches of its intrastate business, required to provide compensation, limiting such payroll to business which is wholly within State control and regulation, and utterly excluding therefrom all service in the field covered by Federal law, and will properly group the different risks and classify the employees according to hazard, and protect the defendant against any overcharge. The State of Massachusetts has pledged its faith to administer the law in accordance with the limitations clearly stated in the instant case.

(15) The defendant's contention that it will meet insurmountable difficulty if it chooses to become a subscriber is unsupported. The record is bare. There is no such presumption, and it is a matter of common knowledge that the cost can and will be determined upon a fair and equitable basis.

The defendant assumes that it might be unable to ascertain the amount of its employees' wages in that service which is wholly within state control, but it offered no evidence upon that point at the trial. The Constitution does not deny to the states the power to ascertain, unless they encroach upon some field occupied by Congress, "a fair and equitable method of computing the premiums due." (R. p. 40) "It cannot be presumed, in the absence of any evidence or finding, that a fair and equitable method of ascertaining and computing the premiums due from the defendant in respect to insurance of its (R. p. 41) employees engaged in intrastate commerce cannot be worked out if it

desires to become an insured employer under the act. Certainly we cannot take judicial notice that there is any such practical impossibility. The evidence in the present record does not require a finding of that nature. The defendant requested no ruling on this point and hence it is not open to it."

(16) Competent governmental authority in each field of regulation should be recognized.

The practical administration of the compensation system by the State, within the field of local control, is no more difficult than many other problems which have arisen from the complexities of modern industries operating in both interstate and intrastate commerce, and necessarily regulated by Federal law in their interstate business and by State law in the other part of their business, which is in the field left to the State.

"The separation of intrastate and interstate property, revenues, and expenses of the company is important, not simply as a theoretical allocation to two branches of the business; it is essential to the appropriate recognition of the competent governmental authority in each field of regulation."

Smith vs. Illinois Bell Telephone Co., 282 U. S. 133, 148.

(17) Employment in interstate commerce clearly defined.

A simple rule for the determination of that part of the service of the employees of a carrier which is covered by the Federal Employers' Liability Act has been clearly stated, and is the test for determining (if the defendant chooses to become a subscriber) whether the employee is engaged in interstate commerce, or in work within state control.

"Was the employee at the time [of the injury] engaged in interstate transportation, or in work so closely related to it as to be practically a part of it."

Shanks vs. Delaware, Lackawanna & Western R. R., 239 U. S. 556, 558.

Chicago and North Western R. R. vs. Bolle, ... U. S. .... (No. 60 Oct. Term 1931, Nov. 23, 1931).

Chicago and Eastern Illinois R. R. Co. vs. Industrial Commission of Illinois, ... U. S. .... (No. 79, Oct. Term, 1931, Jan. 4, 1932).

"It will be observed that the word used in defining the test is 'transportation,' not the word 'commerce.' The two words were not regarded as interchangeable, but as carrying different meanings. Commerce covers the whole field of which transportation is only a part; and the word of narrower signification was chosen understandingly and deliberately as the appropriate term."

Chicago and North Western Railroad vs. Bolle, ... *U. S.* .... (No. 60, Oct. Term 1931, Nov. 23, 1931).

(18) The Workmen's Compensation Act, interpreted to apply to that part of the defendant's business only which is wholly within the field of State regulation and control, applies to the defendant in the instant case.

The Commerce clause of the Constitution has been interpreted so many times and so clearly that many rules controlling the operations of carriers in both interstate and intrastate commerce are settled and generally understood. The power of Congress to regulate interstate commerce, even though such regulation also affects intrastate commerce, is plenary. Until Congress takes possession of a particular field through the exercise of its Constitutional power, the states are free to legislate; State laws in the field are superseded when Congress acts, and thereafter have no force or effect. This power of Congress is exclusive and has no limitations other than such as arise from the Constitution itself. Congress may adopt measures effectually to prevent every unreasonable, undue, or unjust obstruction to, burden upon, or discrimination against interstate commerce, whether it results from state regulation or the voluntary acts of carriers. In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. The states have the undoubted right to control their purely internal affairs, in doing which they exercise powers not surrendered to the national government. Thus, a State may impose a license tax upon a telegraph company on account of business done wholly within the state. A state statute imposing a tax on the privilege of running sleeping cars over railroads, which in terms applies strictly to business done in the transportation of passengers taken up at

one point in the state and transported wholly within the state to another point therein, is not violative of the Commerce clause. The fact that a railroad company is in a general sense engaged in interstate commerce does not prevent the operation of a Workmen's Compensation Act, but no state Workmen's Compensation Act can apply to an employee of an interstate carrier when he is engaged in interstate commerce or other work where recovery may be had under federal law in case of injury. Railway cars are not exempt from attachment under State laws, though they may have been, or are intended to be used in interstate commerce. Sums of money due from other carriers as the non-resident defendant carrier's share of the freight on interstate shipments are not exempt from garnishment under the State laws. States may make ordinary police regulations, even to the extent of requiring that transportation of freight shall be suspended on Sunday, without violating the Commerce clause. States are not permitted to impose any tax upon franchises conferred by the United States for constructing a railroad across the state and other states and taking toll therefrom, nor can states impose any tax upon the interstate business of a carrier, but states may tax the purely intrastate business. They may tax cab service maintained within the state by a carrier. States may establish inspection, quarantine, and other regulations to govern the ports of the state. The general rule is that Congress alone can regulate all interstate commerce, including all interstate transportation and matters so closely connected therewith that its regulation thereof is essential to the full exercise of its regulatory power over interstate commerce, and every such regulation by Congress utterly excludes the operation of any State law affecting the same matter. If there is conflict between Federal and State laws, State laws must yield. If there is no such conflict, State laws

enacted under the powers reserved to the states are valid. The field of which Congress has taken possession is to be determined by the law itself. The field of which Congress has not taken possession is left to the operation of State laws until Congress acts. Thus, in enacting the Federal Employers' Liability Law Congress covered the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce. This act was passed after the decision in the first *Employers' Liability* cases, 207 U. S. 463 holding the first Employers' Liability statute, enacted in 1906, unconstitutional because it included intrastate commerce, over which Congress had no control. The present Act was drafted and passed in 1908, shortly following a message from the President advocating an adequate national law covering all such injuries and leaving to the action of the several states only the injuries occurring in intrastate employment. This Act was intended to be as comprehensive of injuries occurring without negligence, as to which class is impliedly excludes liability, as it is of those as to which it imposes liability. It is a regulation of the carrier's duty or obligation as to both. It covers the field of injuries occurring either with or without negligence in interstate commerce, and to that extent supersedes all State laws covering the same field by reason of the supremacy of the national authority, but it leaves the states free to legislate concerning injuries occurring in intrastate employment. Where the injury occurs outside of interstate commerce, the Federal act does not apply, and the law of the state is controlling.

New York Central Railroad Co. vs. Winfield, 244 U. S. 147.

Wabash Railroad Co. vs. Hayes, 234 U. S. 86, 89.

Employers' Liability Cases, 207 U. S. 463.

Second Employers' Liability Cases, 223 U. S. 1.

Seaboard Air Line Railway vs. Horton, 233 U. S. 492.

St. Louis, Iron Mountain & Southern Railway vs. Hesterly, 228 U. S. 702.

Taylor vs. Taylor, 232 U. S. 363.

Addyston Pipe and Steel Company vs. United States, 175 U. S. 211, 247.

Sands vs. Manistee River Improvement Co., 123 U. S. 288, 2.

Mountain Timber Company vs. Washington, 243 U. S. 219.

Minnesota Rate Cases, 230 U. S. 352.

Pullman Company vs. Richardson, 261 U. S. 330.

Pullman Company vs. Kansas, 216 U. S. 56.

Postal Telegraph Company vs. Fremont, 255 U. S. 124.

New York Central Railroad Co. vs. White, 243 U. S. 188.

New York Central Railroad Co. vs. Winfield, 244 U. S. 147.

Hennington vs. Georgia, 163 U. S. 318.

Pennsylvania Railroad Co. vs. Knight, 192 U. S. 21.

Mutual Film Corporation vs. Ohio, 236 U. S. 230.

Louisiana Public Service Commission vs. Texas and New Orleans Railroad Company, ... U. S. .... (Nos. 36, 37, October Term, 1931, Nov. 23, 1931).

(19) The State law as interpreted in the instant case is in harmony with Federal law, and the fellow servant defense is not open under either law.

There is harmony between the Federal and State laws.

With the fellow servant defense abolished by statute in Massachusetts in action at common law to recover damages for injuries sustained by employees in the course of their employment in work wholly within State control, and the fellow servant defense abolished in actions by employees of carriers to recover for injuries caused by the carriers' negligence when engaged in interstate commerce, the employees of a carrier have substantially the same remedies for wrongs resulting from injury through negligence whether they happen to be engaged at the moment of injury in interstate or intrastate commerce. Under our dual system of government, interstate commerce is regulated by Congress. So far as Congress has acted in such regulation, all state laws are superseded, but in the remaining field of commerce, which is left to the regulation of the states, reasonable regulation by State laws, including the abrogation of the common law defenses and the adoption of the modern compensation system in place of common law actions, is not repugnant to the Constitution of the United States. Thus, the Federal and State governments, each in its own field, regulate commerce without conflict.

The defendant has acquiesced in the construction of the state statute abolishing common law defenses for more than twenty years. From such long acquiescence it is to be inferred that no valid ground of objection exists.

It would destroy all uniformity of liability of a carrier for injuries to its employees through negligence of other employees transacting the carrier's business to hold that

the fellow servant defense, which is not open in cases under the Federal Employers' Liability Act, is open in common law actions in cases where the employee is not engaged in interstate commerce when he suffers the injury. If the defendant's contention is sustained, and the fellow servant defense is held open to the defendant in the instant case, every carrier by rail in Massachusetts can escape all liability for injuries which its employees may suffer while engaged in intrastate commerce through the negligence of employees in the service of the carrier; a heavy financial burden will be imposed upon society, or the state, instead of the industry from which it sprung, and the defendant, and other carriers, if unwilling to subscribe to the modern system of compensation and protected by law against liability in damages, will be permitted under the Constitution to let those of their injured employees who are not engaged in interstate commerce at the time they are hurt lie and suffer where they fall.

Respectfully submitted,

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